



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 225 of 2012

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 221 LAWS OF KENYA

AND

IN THE MATTER OF FATAL ACCIDENTS CAP 32 LAWS OF KENYA

AND

IN THE MATTER OF WORK INJURY BENEFITS ACT NO. 13 OF 2007

BETWEEN

PAULINE WACHUKA MIRINGU

MONICA NDURU WAWERU

PENINA NYAWIRA CHIIAPPLICANTS

(Suing as Administrators of the estate of (DAVID MIRIGU WAWERU)

VERSUS

AKAMBA PUBLIC ROAD SERVICE LIMITED.....RESPONDENT

RULING

The applicants have filed a notice of motion dated 12th April, 2013 under Order 51, Rule 1 of the Civil procedure Rules, Section 1A, 1B & 3A and 95 of the Civil Procedure Act (2009); section 28 (2) , (4), (5), of limitation of Actions Act Cap. 22; Sections 4 & 7 of Fatal Accidents Act Cap.32; Work Injury Benefits Act No. 14 of 2007; Laws of Kenya and all other enabling provisions of the law) seeking the following orders;

1. Spent
2. This Honourable Court be pleased to grant leave to the Administrators of the Estate of David Miringu Waweru to file a Claim/Suit against the defendant/respondent out of time.
3. The costs of this application be in the cause.

The application is based on the following grounds:

1. The Plaintiffs are the confirmed administrators of the estate of David Miringu Waweru and are

pursuing the instant suit in that capacity as well as beneficiaries.

2. The said David Miringu Waweru died on 20th day of June, 2008 , as a result of a road traffic accident while on duty for the Respondent herein.
3. The Plaintiff/ Applicants only managed to procure Confirmation of the Grant for the estate of the said David Miringu Waweru (deceased) on the 4th day of March, 2010 and a certificate thereof on the same on the 4th April, 2010.
4. The Respondent had continuously assured the Plaintiffs/ Applicants that compensation for the death of her late husband David Miringu Waweru (deceased) would be immediately effected by their insurers M/s general Accident Insurance Company ltd upon procurement and presentation of the said certificate of Confirmation of a grant a position which had also been confirmed by the said insurers albeit verbally.
5. Even after presentation of the said confirmed Grant the same assurances were made but not yet honoured to date.
6. After several futile attempts to get information on the progress of their claim from the Defendants/ Respondents the Plaintiff's / Applicants through their Advocates M/S Ongicho & Co. Advocates issued a demand for the said compensation vide their letter dated the 15th day of October, 2011.
7. Its only much later, towards the end of 2011 that the Applicants learnt that the Respondents and/ or their insurers had no intention of compensating them for the loss of David Mirigu waweru (Deceased) , hence this suit.
8. It is clear from the foregoing that the Defendant/ Respondents mislead the Plaintiffs/Applicants that they would indeed be paid until the Plaintiff's/Applicants were time barred by the limitation of Actions Act, only for the Defendant/ Respondent and its said Insurance to go back on their word.
9. In the circumstances of this case it is not fair and just that the Court grants the orders sought herein.

In the applicant's joint supporting affidavit they avers as follows; That they instructed the law firm the law firm of M/S Ongicho-Ongicho & Co. Advocates to pursue this claim on our behalf to its logical conclusion. That they are the confirmed administrators of the estate of David Miringu Waweru and are pursuing the instant suit in that capacity as well as beneficiaries. That the said David Miringu Waweru died on 20th day of June, 2008 as a result of a road traffic accident while on duty for the respondent herein. That they only managed to procure confirmation of the Grant for the estate of the said David Miringu Waweru (deceased) on the 4th day of March, 2010 and a certificate thereof on the same on the 14th April, 2010 vide Embu High Court Succession cause Number 265 of 2008 '**PMP**' 1. That the Respondent had continuously assured them individually and collectively that compensation for the death of our late husband David Miringu Waweru (deceased) would be immediately effected by their insurers M/s General Accident Insurance Company Ltd upon procurement and presentation of the said Certificate of confirmation of Grant a position which had also been confirmed by the said insurers albeit verbally. That upon procurement and presentation of the said the same assurances that they would receive compensation for the death of their late husband David Miringu Waweru (deceased) as under the work Injury Benefits Act number 14 of 2007 were made. Indeed the Respondent herein confirmed that they had received a computation for the said compensation and had forwarded the same to their said insurers M/S General Accident Insurers and we were requested to await the processing of the said compensation compensations. They have attached '**PMP2**' a copy of the compensation computation as drawn by Dr. J N Githiari an Occupational Health and Safety Officer.

That after several futile attempts to get information on the progress of our claim from the Defendants/Respondents, through their advocates M/s Ongicho- Ongicho & Co. Advocates issued a demand for the said compensation vide their letter dated 15th day of October 2011, '**PMP3**'. That towards the end of 2011 that they learnt that the Respondents and /or their Insurers had no intention of compensating them for the loss of David Miringu Waweru (deceased), as the said Respondent and its

insurers M/S General Accident Insurers Limited had fallen out on whether or not our said late husband's claim was legitimate hence this suit. That the Defendant/ Respondent misled them to believe that they would indeed be paid until their claim was time barred by the limitation of Actions Act, only for the Defendant/Respondent and its said Insurance renege on their word. That in the premises would only fair and just that the Court grants the orders sought herein as if this claim is limited, they would be robbed of a bona fide opportunity to redeem compensation for the unfortunate demise of their late husband DAVID MIRINGO WAWERU (Deceased). The respondents would succeed in their unfair prank of misleading them until their claim was time barred in order to thwart them from a legitimate claim. That there is no other suit pending and that there has been no previous proceedings in any court between them or any other persons claiming for or on behalf of the estate of DAVID MIRINGO WAWERU (Deceased) and the Respondent / Defendant over the same subject matter.

I have considered the application before me the deceased died in June 2008. The applicants procured a confirmation of grant on the 4th of March 2010. The applicant's explanation in not filing the suit against the respondents is that there were negotiations with the respondents with an intention to compensate them and that it is only towards the end of 2011 that they learnt that the respondents had no intention of compensating them. It is obvious that the applicant had counsel representing them in their negotiations. Section 28(1) of the Limitation of Actions Act provides that an application for leave of the Court, for the purposes of section 27 (2) is made ex parte. Under section 28 of the act where an applicant seeks leave to bring an action he is required to fill the requirements of section 27(2) in relation to the cause of action. I note that the application did not cite section 27 of the Limitation of Actions Act. Section 27 deals with extension of limitation period in ignorance of material facts in action of negligence.

Section 27(2) provides that the ***requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which;***

a) Either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

b) In either case, was a date not earlier than one year before the date on which the action was brought.

The applicant has shown that in March 2010 they had a right to sue and seek compensation for the deceased. They obtained a grant in April 2010 and began negotiations on the workers compensation injuries benefits in 2009. Their counsel wrote a demand letter for the said compensation for the deceased in October 2010 and there are letters attached showing exchange of correspondence between them. The letter dated 22nd of September 2010 from the Claims Manager G A insurance where he states that the deceased's injury did not arise out of or the cause of employment to sustain a claim under the Work Injury Benefits Act, should have caused the applicants to move to Court immediately. They had no reason not to file suit within the prescribed time provided in law. They were therefore well aware that to institute proceedings they needed a grant which they obtained and they had a lawyer who knew of the limitation period. Their reason that they were misled by the defendant/respondent cannot hold water. The applicants have failed to demonstrate that they warrant the orders being sought. The applicants were aware of the material facts and their counsels too to enable them file suit within the limitation period. I therefore find no merit in the application and dismiss the application with no orders as to cost.

Orders accordingly.

Dated, signed and delivered this 18th day of April 2013

**R. OUGO
JUDGE**

In the presence of:

.....Applicants

.....Respondent

.....Court clerk